UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

PAUL R. MC DONNELL,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
AT-0351-99-0395-I-1

DATE: November 15, 1999

Paul R. Mc Donnell, Orange Park, Florida, pro se.

Tracey D. Gallaway, Stennis Space Center, Mississippi, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the initial decision (ID) that dismissed his appeal for lack of jurisdiction. The Board DENIES the appellant's PFR for failure to meet the Board's criteria for review under 5 C.F.R. § 1201.115. However, for the reasons set forth below, the Board REOPENS the appeal on its own motion pursuant to 5 C.F.R. § 1201.118 and AFFIRMS the ID as MODIFIED, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶1 The appellant, a GS-6 Program Assistant, was on leave without pay and receiving Office of Workers' Compensation Programs (OWCP) payments because

of an April 1997, on-the-job injury. On August 3, 1998, his physician advised him and the agency that he could return to work on a part-time basis, 4 hours per day, with certain restrictions. Initial Appeal File (IAF), Tab 7, Subtab 18. The agency, which was in a pre-reduction in force (RIF) mode at the time, offered to restore him to a GS-6 Program Assistant position which, in its view, met his restrictions and which OWCP considered suitable. *Id.* at Subtab 9. While he was contemplating the offer, the agency, on December 11, 1998, issued him a specific RIF notice. It stated that, due to a reduction in "end strength" in his Activity, it was necessary to conduct a RIF. Although he had assignment rights to the GS-6 position of Computer Assistant (a position he had formerly held), the appellant was an assignment to the vacant position of Transportation Assistant, GS-6, because that position provided a reasonable accommodation to his physical limitations. *Id.* at Subtab 17. Several days later, the agency offered him the same GS-6 Transportation Assistant position in connection with his restoration to duty from his compensable injury. *Id.* at Tab 6, Subtab 4k. On February 3, 1999, the agency sent the appellant a notice indicating that, because his Program Assistant position had been abolished, and because he had not indicated that he would accept the Transportation Assistant position, he would be separated by RIF on February 12, 1999. *Id.* at Subtab 4g. Effective that same day, however, pursuant to 5 C.F.R. Part 353, the appellant was returned to duty as a GS-6 Program Assistant, *id.* at Subtab 4d, and immediately reassigned to the position of GS-6 Transportation Assistant. *Id.* at Subtab 4b.

¶2 On appeal, the appellant alleged that he should have been placed in the Computer Assistant position to which he had assignments rights, and he disputed the agency's claim that the Transportation Assistant position accommodated his physical limitations. He also contended that his placement in that position constituted discrimination based on his disability ("complete dropfoot, palsy of the peroneal nerve") and was in reprisal for his protected equal employment

opportunity (EEO) activity. He declined a hearing. *Id.* at Tab 1. Upon review, the administrative judge (AJ) indicated that it appeared the appellant was appealing a RIF reassignment without loss of grade or pay, which is not an appealable action, and ordered him to submit evidence and argument proving that the action was within the Board's jurisdiction. *Id.* at Tab 4. Changing his mind and requesting a hearing, *id.* at Tab 5, the appellant repeated his claims that the agency's action violated his assignment rights, that he could have been accommodated in the Computer Assistant position, and that the Transportation Assistant position did not meet his physical limitations. In support of the latter claim, he noted that he had recently been assigned to the position of Military Personnel Clerk at a lower grade. *Id.* at Tab 7. The agency urged that the appeal be dismissed for lack of jurisdiction. *Id.* at Tab 6.

¶3 In his ID based on the written record, the AJ dismissed the appeal for lack of jurisdiction on the grounds that RIF reassignments are excluded from those actions appealable to the Board under the RIF regulations. Initial Decision at 2-3.

¶4 In his PFR, the appellant contends that this is a "mixed case" involving prohibited personnel practices, presumably, discrimination based on disability, and, for the first time, reprisal for whistleblowing. Petition for Review File (PFRF), Tab 1. He again argues that the Transportation Assistant position did not meet his medical restrictions as shown by his subsequent assignment to work as a Military Personnel Clerk, although he advises that, because of additional surgery, he is once again receiving OWCP payments. He also claims, as he did below, that he should have been assigned under the RIF regulations to the Computer Assistant position. *Id.*

¶5 The agency has responded in opposition to the appellant's PFR. *Id.* at Tab 3.[1]

ANALYSIS

¶1 Our review of the record reveals that the AJ erred in finding that the appellant was reassigned by RIF procedures. No SF-50, Notification of Personnel Action, shows his reassignment pursuant to a RIF, IAF, Tab 6, Subtabs 4a-d, and nothing in the record supports a finding that the agency was required to use the RIF regulations. That is so because the action that was effected was the appellant's restoration to duty after partially recovering from his compensable injury. Inasmuch as his former position was abolished in the RIF, he was simply restored to a different comparable position. *Id.* Because, as set forth below, the Board lacks jurisdiction over this appeal under the Office of Personnel Management's restoration-to-duty regulations, the AJ's error in adjudicating this appeal as a RIF appeal did not prejudice the appellant's substantive rights and provides no basis for reversal of the ID. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

¶2 An employee, who is separated or furloughed from an appointment without time limitation as a result of a compensable injury, may have restoration rights under 5 C.F.R. Part 353. *See Mendenhall v. U.S. Postal Service*, 74 M.S.P.R. 430, 436 (1997). The appellant bears the burden of proving the Board's jurisdiction over an appeal from an alleged denial of restoration rights. *Id.* There is no suggestion that the appellant in this case was ever separated, but, because he did not work at the agency from January 21, 1998, until February 12, 1999, he

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[1] After the close of the record on review, the appellant filed what he described as "new" evidence. PFRF, at Tab 4. None of the documents he has submitted are new, however, because they all predate the close of the record on PFR, *id.*, and he has not shown that they were unavailable despite his due diligence. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). Accordingly, we have not considered them.

was presumably furloughed, that is, placed in a nonduty, nonpay status for nondisciplinary reasons. 5 U.S.C. § 7511(a)(5); *see Mendenhall*, 74 M.S.P.R. at 436. The appellant did not fully recover from his compensable injury, 5 C.F.R. § 353.301; nor was he physically disqualified, section 353.101. Thus, his restoration rights, if any, arise from his status as partially recovered. He meets the definition of a partially recovered individual because he is an injured employee who, though not ready to resume the full range of his regular duties, has recovered sufficiently to return to part-time duty. 5 C.F.R. § 353.102. However, an employee who has partially recovered from a compensable injury may appeal to the Board only for a determination of whether the agency has acted arbitrarily and capriciously in denying restoration; he has no right to appeal an alleged improper restoration. *See Scott v. U.S. Postal Service*, 59 M.S.P.R. 245, 248 (1993), *review dismissed*, 22 F.3d 1106 (Fed. Cir. 1994) (Table). The appellant acknowledges that he was restored, but contends that his restoration to the Transportation Assistant was improper because that position did not meet his medical restrictions and because the agency should have placed him in the Computer Assistant job he preferred.

¶3 A partial restoration may be deemed, under appropriate circumstances, so unreasonable as to amount to a denial of restoration within the Board's jurisdiction. However; to make a nonfrivolous showing of Board jurisdiction over an appeal on that basis an appellant must present specific, independent evidence corroborating his allegations. *See Scott*, 59 M.S.P.R. at 248-49. The appellant does not claim that he could not perform the actual duties of a Transportation Assistant, only that the particular building involved was on the second floor and that he has difficulty maneuvering stairs. IAF, Tab 7. Nonetheless, OWCP deemed the position suitable for him. *Id.* at Tab 6, Subtabs 4e and 4j. Decisions on the suitability of an offered position are within the exclusive domain of OWCP, and it is that agency, and not the Board, which possesses the requisite

expertise to evaluate whether a position is suitable in light of an employee's particular medical condition. *See* 20 C.F.R. § 10.124(c); *New v. Department of Veterans Affairs*, 142 F.3d 1259, 1264 (Fed. Cir. 1998); *McLain v. U.S. Postal Service*, 82 M.S.P.R. 526, 530 (1999). The record does not contain evidence supporting the appellant's claim that his partial restoration violated his medical restrictions, and thus that claim does not provide a basis for Board jurisdiction. *See Moore v. U.S. Postal Service*, 76 M.S.P.R. 373, 377 (1997).

¶4 Similarly, the appellant's argument that the agency should have restored him to the Computer Assistant position with duties he prefers does not demonstrate Board jurisdiction over his appeal. Unlike a fully recovered individual, a partially recovered individual has no right to mandatory restoration to his former position or to an "equivalent" one. *See Davis v. Department of Justice*, 61 M.S.P.R. 92, 97, *aff'd*, 43 F.3d 1485 (Fed. Cir. 1994) (Table). Since the agency accomplished the appellant's restoration to duty as a partially recovered individual, the Board lacks jurisdiction to address his complaints about the particular details of his restoration. As such, dismissal of his appeal for lack of jurisdiction is proper.

¶5 In the absence of an otherwise appealable action, the Board lacks jurisdiction to review the appellant's claim of disability discrimination or reprisal for protected EEO activity. *See Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982). Although he claims on PFR that the agency's action constitutes reprisal for whistleblowing, he did not raise this allegation below, IAF, Tab 1, and does not allege that the claim is based on new and material evidence not previously available despite his due diligence. Accordingly, the Board will not consider it. *See Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980).[2]

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[2] With regard to the appellant's claim that he has since been assigned to the lower-graded position of Military Personnel Clerk, it appears that he was only detailed to that position, PFRF, Tab 4, and, therefore, his position of record remains that of

ORDER

¶1 This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c) .

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991)**{** TA \l "Pinat v. Office of Personnel Management, 931 F.2d 1544 (Fed. Cir. 1991)" \c 1 **}**.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read

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Transportation Assistant. *See Rojas v. U.S. Postal Service*, 70 M.S.P.R. 400, 405 (1996). If and when he is officially assigned to that position, or to another at a lower grade than GS-6, such an assignment might constitute a reduction in grade which, if involuntary, would fall within the Board's jurisdiction. *See Moore*, 76 M.S.P.R. at 378-79. Any such assignment is only speculative, however, since, as noted, the appellant advises that he is once again on OWCP because of additional surgery.

this law as well as review other related material at our web site, http:\\www.mspb.gov.**{** TA \l ".gov.FOR THE BOARD:Washington, D.C._____

Robert E. Taylor

Clerk of the Board__2008)" \c 1 **}**

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board

Washington, D.C.

CASE CITATION LISTING

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FILE TITLE: *Mc Donnell v. Navy*

AUTHOR: Schweizer

Rojas v. U.S. Postal Service, 70 M.S.P.R. 400, 405 (1995).....7
Rojas v. U.S. Postal Service, 70 M.S.P.R. 400 (May 01, 1996) (No. SF-0752-95-0159-I-3)

¶1

¶2 **THIS CITE CHECK CONDUCTED BY _____ ON October 27, 1999.**